IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3885 OF 2006

Shri Kanhaiyalal Motilal Talera ...Petitioner

Versus

Shri Dashrath Ramchandra Satav & Ors. ...Respondents

Shri Madhav Jamdar for the Petitioner.

Shri R.S.Apte i/by Shri S.V.Sadavarte for the Respondent Nos.5 to 7.

CORAM : ABHAY S.OKA, J.
DATED : JUNE 20, 2007.

P.C.:

1. Heard learned Advocate appearing for the Petitioner and learned Advocate appearing for the fifth to seventh Respondents. Considering the nature of the controversy involved in this Petition, it is not necessary to issue notice to first to fourth Respondents. The Advocate for Petitioner states that he has served private notice to the said Respondents. Considering the facts and circumstances of the case, the Writ Petition is taken up for final hearing at the admission stage. The Petitioner is the original Plaintiff. The first to fourth Respondents are the original Defendants and fifth to seventh Respondents are the third parties on whose Application the order impugned has been passed.

2. The suit filed by the Petitioner is for specific performance of Agreement dated 10th November, 1985 executed by the first to fourth Respondents in favour of the Petitioner. In the said suit, an Application was made by the fifth to seventh Respondents under Sub-rule 2 of Rule 10 of Order I of the Code of Civil Procedure, 1908 praying that the said Respondents may be impleaded as party Defendants to the suit. The said Application was objected to by the Petitioner by filing a reply. There was no reply filed by first to fourth Respondents. From the impugned order it appears that the said Respondents have not participated in the hearing of the said Application made by the fifth to seventh Respondents. By the impugned order, the fifth to seventh Respondents have been directed to be impleaded as party Defendants to the suit.

3. The learned Advocate for the Petitioner submitted that added Defendants are total strangers to the suit Agreement and therefore they are neither necessary nor proper parties considering the scope of adjudication in the suit for performance. He placed reliance on a decision of learned single Judge of this Court in the case of **Shamrao Rajeshwarrao Potdukhe Vs. Gurukul Gruha Nirman Bhadekaru Malki Sahkari Sanstha Maryadit, Chandrapur (1995(1) Maharashtra Law Journal**

Page 893). He also relied upon a decision of the another learned single Judge of this Court in the case of **E. Ajay Kumar Vs. Smt Tulsabai and another (AIR 1973 Bombay Page 330)**. He placed reliance on a decision of Apex Court in the case of **Anil Kumar Singh Vs. Shivnath Mishra alias Gadasa Guru (1995(3) Supreme Court Cases Page 147)**. He submitted that in view of the well established position of law, the order impugned could not have been passed. The learned counsel appearing for the fifth to seventh Respondents invited my attention to averments made in the plaint. He also invited my attention to averments made in the Application filed by the said Respondents. He pointed out that the property which is subject matter of the suit Agreement is a property held by a Hindu undivided family in which the said Respondents have undivided share on birth. He submitted that even going by assertions made in the plaint, it is clear that the suit property was of Hindu undivided family. He placed reliance on a decision of the learned single Judge of this Court in the case of **Shivshankareppa Mahadevappa Parakanhatti Vs. Shivappa Parappa Kupati and others (AIR (30) 1943 Bombay Page 27)**. He submitted that as a general rule, a stranger to Agreement for Sale may not be a necessary party in a suit for specific performance. However, there are well recognized exceptions to the said Rule as laid down in

the said decision. He submitted that the case of the said Respondents was covered by one of the three recognized exceptions.

4. I have considered the submissions. It will be necessary to refer to a decision of the learned single Judge of this Court in the case of E.Ajay Kumar (supra). The case before the learned single Judge also arose out of a suit for specific performance of Agreement for Sale of immovable property. In the said suit, a third party who was a stranger to the suit Agreement applied for impleadment as co-defendants. The case made out by the said third party was that he was having an interest in the property and the Defendant in the suit was not competent to enter into the suit Agreement for Sale. The said Application made by the third party was allowed and the order by which the said Application was allowed was challenged by filing a revision Application before this Court. The learned single Judge referred to relevant provisions of the Code of Civil Procedure and in particular to sub-rule 2 of Rule 10 of Order I of the said Code. In paragraph No.9 of the said decision, the learned single Judge observed thus:

> ". Now, in the present case, it is a simple suit for specific performance of an

Agreement to sell certain property. That Agreement will have to be established as pleaded by the plaintiff himself. Not only, (sic) before the Court can be asked to pass a decree the Court can be asked to pass a decree for specific performance the plaintiff is bound to establish all the conditions that are requisite for completing such a sale transaction. It is implicit in such a controversy that if the evidence indicates or if a plea is raised that there is no title under which such an Agreement could have been at all entered into the suit would fail. That does not mean that Court is enjoined to enter upon the questions which are neither pleaded nor are in issue. If the defendant against whom such a suit is filed has a defective title but Agreement is properly enforceable, the plaintiff may choose to take even the defective title in such a suit. Similarly, there may be a title in part with the defendant and that may ultimately pass to the plaintiff. In neither of these cases a stranger to the Agreement and hence to the controversy who claims to be entitled to the property as such can come before the Court

either as necessary or proper party".

5. In paragraph No.10 of the said decision the learned single Judge observed that the cause of action in suit is limited to the Agreement and its enforceability and in this sense such a suit is circumscribed in scope. The learned Judge came to the conclusion that by joinder of a third party, the controversy will be enlarged and therefore he came to the conclusion that the order of the trial Court was illegal. While holding so in paragraph 19 he observed thus:

> "Can it really be said that the stranger to an Agreement is concerned with the relief sought by the plaintiff or the defences raised against such specific performance? **Firstly, he not being a party and being a total stranger, any decision inter parties would not affect his right. It follows that there would be therefore, no prejudice to such a party. The Court that is being called upon to enforce the Agreement is not settling any disputes between the plaintiff and the stranger and as such the presence of such a person is neither necessary nor of any aid to decide upon the**

controversy". (Emphasis supplied)

The same is the view taken by another learned single Judge in the case of Shamrao Rajeshwarrao Potdukhe (supra) by relying upon the decision in the case of E. Ajay Kumar (supra). In the case of Anil Kumar Singh (supra) the Apex Court has considered the scope of sub-rule 2 of Order 10 of Rule I. In paragraph No.9 of the said decision the Apex Court has held thus:

> "9. Sub-rule (2) of Rule 10 of Order 1 says that "necessary parties are persons who ought to have been joined as a party to the suit, a necessity to the constitution of the proper suit without whom no relief or order can be passed". In order that a person may be considered a necessary party, defendant to the suit, the conditions precedent must be (1) that there must be a right to some relief against him in respect of the dispute involved in the suit; and (2) that his presence should be necessary to enable the court to effectually and completely to adjudicate upon and settle all the questions involved in the suit. **Since the respondent is not a party to the Agreement of sale, it cannot be said that**

> **without her presence the dispute as to specific performance cannot be determined. Therefore, she is not a necessary party**". (Emphasis supplied)

6. It will be also necessary to refer to the decision in the case of Shivshankareppa Parakanhatti (supra) relied upon by the learned counsel for the contesting Respondents. In the said decision, the learned single Judge reiterated the general rule that in a suit for specific performance, a stranger to the contract cannot be sued upon and only parties to the contract are necessary and sufficient parties. The learned Judge however craved out the three exceptions. The first exception was in a case where a novatio was pleaded. The second one is in a case where third party is claiming on the basis of an interest arising under a prior contract and third one is in a case where it is desirable to avoid multiplicity of the suits.

7. As held by the learned single Judge of this Court in the case of E. Ajay Kumar (supra) it is obvious that the decree passed against the Defendants in the suit will not be binding on fifth to seventh Respondents and will not affect their alleged rights. Even assuming that the first to fourth defendants i.e

the alleged vendors of the Petitioner have only undivided share in the suit property, the decree will relate to their share and in no case the decree will affect the rights of the fifth to seventh Respondents. It must be noted here that the Petitioner has not prayed for a relief of partition in this suit which could have been prayed for in view of section 22 of the Specific Relief Act, 1963. It is obvious that the case of the fifth to seventh Respondent does not fall in any of the exceptions laid down in the case of Shivshankareppa Parakanhatti (supra). Thus, in view of the settled position of law, the Application made by the fifth to seventh Respondents could not have been allowed by the trial Court. Therefore, the impugned order deserves to be quashed and set aside.

8. Hence, I pass the following order:

(i) The impugned order dated 14th March, 2006 is quashed and set aside and subject to what is observed in this Judgment, the Application made by the said Respondents at Exhibit 89 is hereby rejected.

(ii) Writ Petition is allowed in above terms with no orders as to costs.

JUDGE